Supreme Court of the United States.

October Term, 1897, No. 496

IN THE MATTER

OF

THE PETITION OF PULLMAN'S PALACE CAR COMPANY

for

WRIT OF CERTIORARI.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Third Circuit to Certify to the Supreme Court for its Review and Determination the Case of Pullman's Palace Car Company, Appellant, against The Central Transportation Company, Appellee.

A. H. WINTERSTEEN,
EDWARD S. ISHAM,
JOSEPH H. CHOATE,
Counsel for Petitioner.

Supreme Court of the United States,

OCTOBER TERM, 1897.

Petition for writ of *certiorari* requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court for its review and determination the case of Pullman's Palace Car Company, appellant, *versus* the Central Transportation Company, appellee.

To the Supreme Court of the United States:

The petitioner, the above mentioned appellant, respectfully represents as follows:

The original bill was filed in April, 1887, and in April, 1891, before the cause had been heard or was ready for hearing and before any order affecting its merits had been made, the complainant moved the dismissal of the bill at its own cost, because in the meantime the subject matter of the controversy had been entirely disposed of by a judgment of this Court rendered in another cause between the same parties (139 U. S., 24). The defendant, opposing the dismissal procured the original cause to be compulsorily retained for the purpose of giving support to a so-called cross-cause to be instituted by the defendant (Record, p. 552; 49 Fed. Rep., 261). The complainant, nevertheless, abandoned its bill, and no proceedings have since been had except in that cross-cause.

When the original bill was filed there was subsisting between the parties the contract called a lease, which was the subject of the judgment of this Court in the case above cited.

Acting upon authority of express provisions of the lease itself, the lessee, in June, 1886, had given notice of an election to terminate it. The lease, however, contained stipulations in such case for a restoration of the demised property, and a restoration conforming to the terms of the lease had become impossible. The primary object of the bill, therefore, was to obtain the aid of the Court in a substantial instead of a literal performance of those terms of the lease which related to the restoration of the subject matter of the demise.

The bill also averred as an additional ground for equitable relief, that the complainant had, in January, 1885, been dissuaded by the defendant from its then declared purpose to terminate the lease, and induced to adopt the alternative provided of paying the defendant an equitable share of the revenues that might be realized under the lease, which was then agreed to by the defendant and the agreement afterwards repudiated; and it prayed the Court to decree whether the election then made to pay a share of the net revenues instead of terminating said lease was not conclusive upon both parties thereto. If not so binding, it prayed that the act of termination declared in June, 1886, might relate back and take effect from January, 1885; and it prayed injunction against the further prosecution of suits at law for rental accruing after January, 1885, and against suits at law for installments of rental accruing after the termination of the lease, and for a receiver to take possession of the railway cars or other property which the bill *seeking affirmative performance of the lease* offered to turn over to the defendant.

Incidentally the bill stated to the Court the advice of counsel which the complainant had received that the lease itself was invalid, and not enforceable

by either party. It did not insist or aver that the lease was void for illegality, it did not repudiate it or disaffirm it, or refuse on that ground to pay rental or otherwise to perform its terms. On the contrary, the purpose and prayer of the bill were affirmative execution of those provisions of the lease itself which provided in a certain event for termination of the lease according to its terms.

The cross-bill set forth the judgment of the Supreme Court of the United States in the case above cited (Pullman's Pal. Car Co. *vs.* Cent. Trans., 139 U. S., 24), and that the Supreme Court had held the lease "invalid by reason of the same having been *ultra* "*vires*, and for other reasons." (Rec., p. 556); and that said agreement was therefore null and void. It averred that all the property described in the lease had been delivered to the complainant in pursuance of the lease and for its specified purposes, and that it was the duty of the cross-defendant to return said property, including, *inter alia*, the patent rights, the railway sleeping cars, with their bedding and equipment, the contracts which had been assigned to it, and all new contracts and renewals thereof entered into with any of the railroad companies with whom the cross-complainant had contracts at the time of making said agreement. The cross-bill then proceeded as follows:

> "If it be not within the power of the said car company to make such delivery, then, as your orator is advised and therefore avers, it is its duty to deliver an equivalent therefor, and to account for the profits which it has derived under and by reason of the property delivered to it under said agreement.
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> "It is further the duty of said car company, as your orator is advised and therefore avers, to fully account for all profits which it derived from the use of said property.
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> "10. Your orator is advised and therefore avers that the said car company now holds all contracts for transportation made by it with railroad companies with whom there were transportation contracts with your orator at

the time of said agreement of the 17th of February, 1870, in trust for your orator, with a duty to account for the profits derived therefrom.

"Being without an adequate remedy at law, your orator prays equitable relief as follows:

"(*a.*) An account by the said car company of all the profits which it has derived since the making of said agreement of the 17th of February, 1870, by the use of the property transferred to it under said agreement by your orator.

"(*b.*) A decree that the amount found due by said accountant for said use of said property shall be paid over to your orator.

"(*c.*) A decree that the said car company is the trustee for your orator for all contracts for transportation, whether original, new or renewals, held by it with railroad companies with which there were contracts for transportation with your orator at the time of making said agreement of the 17th of February, 1870.

"(*d.*) A decree ordering the said car company to pay to your orator all such sums as shall be due it by said company as such trustee, and that it shall, in the future, from time to time, account for the sums which shall be due by reason of future operations under said contracts.

"(*e.*) Discovery and an account by the said car company of its use and disposition of the property turned over to it by your orator, and a delivery by said car company to your orator of all such property in proper order and condition, or if this cannot be done, a decree that the value thereof shall be paid to your orator, and that all sums derived from said property shall be paid over.

"(*f.*) General relief."

To this cross-bill three demurrers were filed and overruled (Rec., pp. 558-561); and thereupon the Pullman Company, the cross-defendant, by its answer (Rec., p. 562), admitted the delivery to it of the property mentioned in said lease and its schedules, but averred that all the said property was de-

livered and received in pursuance of said lease, and *to be used in promoting the purposes* of said lease, and not otherwise. It showed that all of said railway contracts had expired by lapse of time or otherwise; that none of them reserved any right of renewal to the Central Company, and that all the patent rights had expired. It furnished statements of the use, value and disposition of the railway cars, and the extent to which they had been used up or destroyed in the conduct of the business while the lease was in operation, and averred that during that time it had paid, as compensation under the lease, to the cross-complainant the sum of $3,960,000; that it was at all times the duty of the cross-complainant, said lease being illegal and void, to resume possession of its property or so much of it as continued in existence, and particularly to have accepted the same when tendered to it and offered to be restored in June, 1886; that from that date no obstacle had been placed in the way of its possession, and that it should be deemed to have been in the control and possession thereof; that it had asked the Court to take possession thereof by a receiver, but that said cross-complainant making objection thereto, the Court, refused to do so. Among other things it averred further that the alleged title of the cross-complainant, as presented by said cross-bill, to the property therein mentioned, was a strictly legal title and was the proper subject matter of an action at law if any right of action at all existed therefor, and that any claim to profits or earnings as asserted by said cross-bill, if it existed, was merely an incident to said legal title and equally the subject matter of an action at law; and insisted that if any such right as that asserted by the cross-bill existed in said cross-complainant, the remedy therefor was at law, and the *answer expresly asserted* the claim that, under the *Constitution* of the United States, and the acts of Congress, the court of equity had no jurisdiction thereof.

Testimony having been taken, the cause came on for final hearing, and on December 18, 1894, the Court, by BUTLER, *J.*, filed its opinion shown in the Record at pages 745 and 1126, whereby it held that the cross-defendant must account to the cross-complainant for the value of the property delivered under the lease "when received, together with its earnings since, less the amount paid as rent." The Court at the same time referred the cause to a master, for the purpose of ascertaining these values, and the report of the Master is shown in the Record, pages 1133 to 1183.

On the coming in of the report exceptions were filed by the cross-defendant, which were argued and are shown in the Record, at pages 1185 and 1188. All were dismissed, however.

Certain exceptions were also filed by the counsel for the cross-complainant (Rec., p. 1187), and these were also dismissed; but the suggestions they contained were embodied by the Court in its opinion and judgment, which are shown at page 1194 of the Record.

There the Court declared that the burden was on the cross-defendant to show the earnings and that they were less than the rental; that the Pullman Company was in default for not furnishing evidence not called for by the order of the Court, and that all intendments were adverse to it, and it would be assumed that the earnings were at least equal to the rent, or the Pullman Company would have shown the contrary; that it is liable, not for the value of the property in 1870 when it was received, as was held in the order of reference directing the Master to find the value of that date, but for the value in 1885, when under judgment in suits at law the lease was dissaffirmed; and that the inquiry *had been directed* to the value in 1870 *for the purpose* of ascertaining thereby the value in 1885.

Decree was rendered on the cross-bill for the estimated value of the so-called "plant" or "property" of the Central Transportation Company in 1870, as-

sumed without inquiry or evidence to be its value also in 1885, and for interest thereon from that date, with no account of intermediate interest or earnings or of the payments which amounted without computation of interest to nearly $4,000,000. This judgment is shown on page 1197 of the Record and is as follows:

> "And now, January 24, 1896, the above cause having been heard upon exceptions to the report of Theodore M. Etting, Esq., Master, and having been argued by counsel for the respective parties and considered by the Court, it is ordered and decreed in conformity with the opinions of the Court filed—
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> FIRST.—That both the exceptions filed by the Central Transportation Company and the exceptions filed by Pullman's Palace Car Company to the Master's report be dismissed.
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> SECOND.—That Pullman's Palace Car Company pay to the Central Transportation Company the sum of four million two hundred and thirty-five thousand and forty-four dollars.
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> THIRD.—That Pullman's Palace Car Company pay the costs of this cause incurred on account of the cross-bill."

II. Thereupon the petitioner prayed an appeal to the Supreme Court of the United States and filed an assignment of errors (Rec., pp. 1198-1204), considering that under the provisions of Section 5 of the Act of Congress of March 3, 1891, which direct appeals to be taken from the Circuit Courts to the Supreme Court in any case that involves the construction or application of the Constitution of the United States, and in any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States, its appeal lay directly to that Court. The direct appeal to the Supreme Court having been resisted (Rec., p. 1199) and the right to such direct appeal having been drawn into question, another and separate appeal was, on April 29, 1896, and

within the time prescribed by law, taken to the United States Circuit Court of Appeals for the Third Circuit.

When, on the 22d of September, 1896, the cause was in that court reached for argument, the appellee presented a motion to dismiss the appeal, contending that it was void, and the Court without jurisdiction, because a previous appeal had been taken to the Supreme Court and was pending there. The Court of Appeals heard argument upon the motion, and also heard argument in the cause upon its merits, but afterwards, on October 7, 1896, entered its order, by which it overruled the motion to dismiss the appeal, and continued the cause, without decision thereof, on account of the question of jurisdiction existing in both courts "to await the result of the appeal to the Supreme Court."

The opinion of the Court, filed upon that hearing, and the entry of that order is as follows:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

PULLMAN'S PALACE CAR COMPANY, *Appellant*,

vs.

CENTRAL TRANSPORTATION COMPANY.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Argued September 22 and 23, 1896, before Shiras, Circuit Justice, and Wales and Green, District Judges.

We are met at the threshold of this case with a motion to dismiss the appeal, on the ground that it is void, having been taken

while a previous appeal to the Supreme Court was pending and undetermined.

The final decree of the Circuit Court was entered on January 26, 1896, and an appeal therefrom to the Supreme Court was taken and allowed on February 1, 1896. That appeal is still undisposed of, and, so far as we are informed, no motion to dismiss the same has been made.

The appeal to this Court was taken on April 29, 1896, within the time prescribed by law. If this motion to dismiss should prevail, it would be too late to take another appeal, even if the appeal to the Supreme Court should hereafter be held by that Court to have been improvidently taken. The hardship thus resulting would not, of itself, be a sufficient reason why the motion should not be granted; nor can the inaction of the appellee in not at once moving to dismiss the appeal to the Supreme Court, and thus affording an opportunity to the appellant to take a timely appeal to this Court, be deemed to estop the appellee from insisting on its present motion. But such resulting hardship may well warrant a refusal of the motion unless it is quite clear that no other course is legally permissible.

Undoubtedly, the principle contended for by the appellee, that a party cannot prosecute two appeals in the same case at the same time, may be conceded to be a general one. But does the present case fall within that principle?

The record discloses that the appeal to the Supreme Court was taken under Section 5 of the Act of March 3, 1891, upon the proposition that the case is one "involving the construction or application of the Constitution of the United States." The appeal to this Court is based on the provision of the sixth section of the act. Should the Supreme Court decide that the case does not present a constitutional question under the fifth section, and hence dismiss that appeal, it would follow that the appellant's proper remedy is by way of appeal to this Court under the sixth section. Does the fact that the appellant took a void appeal to the Supreme Court defeat its right of appeal to

this Court? Or, in other words, is the act of 1891 to be construed as giving an appellant only an election between an appeal under the fifth section and one under the sixth section?

The question thus presented is a new one, and we do not feel disposed to lead the way in so construing the Act of 1891 as to practically deprive suitors of the right to appeal under both the fifth and sixth sections. And, of course, it is evident that if an appellant cannot take an appeal under the sixth section until the Supreme Court has decided the appeal under the fifth section, the time prescribed by the statute within which the former must be taken would have elapsed.

Our view is that the party seeking to appeal is not, by the terms and meaning of the statute, put to an election between the remedies of the fifth and sixth sections, but has a right to raise a constitutional question by a resort to the Supreme Court, and to avail itself of the defenses permissible under the sixth section by an appeal to this Court.

Of course, if the Supreme Court should hold that it has jurisdiction under the fifth section, that Court will, in the case of a constitutional question, consider and decide the entire case (*Chappel* v. *United States*, 160 U. S., 499), and, in that event, no judgment of this Court would be necessary. Should, however, the Supreme Court decide that it has no jurisdiction to entertain the appeal, this Court will be left free to act under the sixth section. Congress was, of course, well aware that, in the condition of the docket of the Supreme Court as it is and has been for years past, the hearing and determination of an appeal to that Court could not be had within the time fixed for an appeal to this Court, and we are unwilling to suppose that a delay so occasioned was intended to operate as a denial to the party of its rights under the sixth section.

We think the case of *McLish* v. *Raff* (141 U. S., 661), relied on by the appellee, is not inconsistent with this view. The appeal there was under the first clause of the fifth section, raising the question of the jurisdiction of the Circuit Court, and the writ of error was sued out to the Supreme Court before final judg-

ment. It was held that the question of the jurisdiction of the Circuit Court could only be raised by electing to have such question certified to the Supreme Court, where that question only would be considered. The language of the Court must be read in view of that single question. The present case is one arising under other clauses of the fifth section, whereby are raised questions involving the construction or application of the Constitution of the United States, and which by the terms of the statute are for the sole and exclusive jurisdiction of the Supreme Court. That this is the true reading of that decision appears from its statement that the act "provides for the distribution of the entire appellate jurisdiction of our national system between the Supreme Court of the United States and the Circuit Courts of Appeals therein established, by designating the classes of cases in respect of which each of these two courts shall respectively have jurisdiction. But as to the mode and manner in which those revisory powers may be invoked, there is, we think, no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of Federal courts as to extend the jurisdiction of the Supreme Court to the review of jurisdictional cases in advance of the final judgments upon them."

The motion to dismiss the appeal is overruled, and the cause is continued to await the result of the appeal to the Supreme Court.

GEORGE SHIRAS, Jr.,
Ct. Justice,
Oct. 7, 1896.

III.—The appeal taken as aforesaid to the Supreme Court of the United States was, on the calendar, numbered 463 of the October Term, 1896, of that Court, and at that Term, on December 7, 1896, a motion was presented to dismiss that appeal on the alleged ground, that the record disclosed no questions which, under the act of March 3, 1891, would give that Court jurisdiction to entertain the

appeal. Under the provision of the fourth clause of Rule 6, the motion to dismiss the appeal was submitted on printed arguments, and the subject of the motion was ordered postponed until the hearing of the case on the merits.

IV.—Subsequently the petitioner presented to the Circuit Court of Appeals for the Third Circuit the following motion:

"And now, September 14, 1897, comes the appellant, Pullman's Palace Car Company, and moves that, in accordance with the authority conferred by the sixth section of the Act of Congress of March 3, 1891, being the Act to establish Circuit Courts of Appeals, this Court will certify to the Supreme Court of the United States for its instruction thereon the question of law, namely: The question whether this Court under this appeal has jurisdiction according to the provisions of the Act of Congress aforesaid to hear and determine this cause."

This motion was heard on October 1, 1897, and refused. The opinion of the Court filed upon that hearing and the entry of that order is as follows:

PULLMAN'S PALACE CAR COMPANY
vs.
CENTRAL TRANSPORTATION COMPANY.
October 1, 1897.

This is a motion asking us to certify to the Supreme Court the question whether this Court has jurisdiction to hear and determine the cause.

Upon a former occasion we felt constrained to refrain from passing on the merits of this case while it was pending on an appeal to that Court, nor do we now perceive that any useful result would be promoted by granting the present motion. Until the Supreme Court shall have determined the question there

pending on the appeal and on the motion to dismiss this appeal this Court thinks it would not be proper to deal with the case on its merits, and it may be that the action of the Supreme Court may relieve this Court from any further duty in the case.

The motion is refused.

GEO. SHIRAS,
As. J. S. Ct.

V.—Your petitioner further shows that the jurisdiction of the Circuit Court in the original cause was based on the citizenship of the parties, the petitioner being a citizen and resident of the State of Illinois, and the Central Transportation Company being a citizen and resident of the State of Pennsylvania, so that the cause so far as it is governed by the jurisdiction of the original bill is (unless it comes within the provisions of the Fifth Section of the law which gives direct appeal to this Court), one in which the judgment of the Circuit Court of Appeals would be final; and is one of a class of cases in which, in case of judgment of the Court of Appeals in favor of its own jurisdiction, the Act of Congress appears to confer no right on either party to review of such a judgment by appeal; and there is apparently no provision of law for review, except the provisions of Section 6 of the Act of Congress aforesaid by which this Court may, by *certiorari* or otherwise, require cases to be certified to it for its review and determination. It further represents that the existence of the two appeals above mentioned constrains a decision by one or the other court of the questions of jurisdiction involved; that the general importance, as well as the importance to the parties of the questions presented, cannot be over-estimated, and that they are questions as to which it is of supreme importance that uniformity of decision should be established.

VI.—A certified copy of the entire record of the case in the Circuit Court of Appeals is herewith furnished in conformity with the rule of this court.

VII.—Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Third Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled "Pullman's Palace Car Company, Appellant, *vs.* Central Transportation Company," to the end that the said case may be reviewed and determined by this Court, as provided in section 6 of the Act of Congress entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act.

And your petitioner will ever pray, &c.

PULLMAN'S PALACE CAR COMPANY,
By A. H. WINTERSTEEN,
EDWARD S. ISHAM and
JOSEPH H. CHOATE,
Its Attorneys.